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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Replacement of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems	)	WT Docket No. 96-18
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	)	PP Docket No. 93-253

To: The Commission

COMMENTS OF PAGER ONE ON INTERIM LICENSING PROPOSAL

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Date: March 1, 1996

Summary

The FCC's freeze is causing severe harm to paging companies, and the "Interim Licensing Proposal" contained in the Notice of Proposed Rule Making will provide little relief. Paging is a mature, highly competitive industry; carriers must regularly improve and expand their services in response to customer demand, or risk losing their competitive position in the market.

Due to the freeze, many paging carriers have been, or soon will be, forced to "put on hold" expansion plans, including equipment orders, site lease arrangements, and hiring plans. The FCC's halting of this existing, growing industry is thus having a "ripple effect" throughout many sectors of the nation's economy. The Interim Licensing Proposal, by allowing operators to expand only on a secondary basis, is of little help. The uncertainty attendant to secondary licensing status will chill both debt and equity investment in paging systems, and the loss of a "secondary" service area to a subsequent "primary" licensee will cost the incumbent a substantial investment and degrade service to the incumbent's subscribers.

Both the freeze and Interim Licensing Proposal are unnecessary; there is so little "white area" left on paging channels that the FCC will not preserve much, if any, spectrum to be allocated and auctioned on a wide-area basis. A more rational approach would be to accept and process paging applications during the pendency of this proceeding under existing rules, slightly modified. Any legitimate mutually exclusive situations that occur can be resolved by competitive bidding, preferably by simple oral outcry or sealed bid auctions. That approach would prevent financial hardship to paging operators, and allow for the more expeditious provision and expansion of paging services to the public.

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Pager One, by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its Comments in response to the "Interim Licensing Proposal" in the Notice of Proposed Rule Making[1] ("NPRM") in the above-captioned proceeding.

I. Statement of Interest.

Pager One is a small company that provides paging services on the 931.6625 MHz and 931.1125 MHz frequencies throughout the states of Florida, Georgia, North Carolina and South Carolina. Throughout the past few years, Pager One has been in the process of building out these systems on a regional basis, and had planned in 1996 to apply for markets in Texas, Alabama, Tennessee and southern Virginia. Major investments toward these expansion plans have been made, including equipment orders.

The imposition of the freeze has put all of these plans on hold. Pager One has been

[1] FCC 96-52 (released February 9, 1996).

forced to cancel equipment orders, contracts for construction of planned sites, and plans to hire personnel in the markets it had hoped to enter this year. As a result of the freeze, Pager One's investment in infrastructure and its ability to carry out its marketing plans are in grave jeopardy. As a licensee whose continued viability is threatened by the freeze, Pager One clearly has standing as a party in interest to file comments in this proceeding.

II. Summary of the Interim Licensing Proposal.

Concurrently with the adoption of the NPRM, the Commission announced that it was "suspending acceptance of new applications for paging channels." See NPRM at ¶ 139. The subsequent paragraphs of the NPRM clarify that applications for modifications that extend a licensee's existing interference contours, pending mutually exclusive applications, and RCC applications for which the mutually-exclusive "cut-off" period had not ended as of February 8, 1996, were also "frozen." The "freeze" provisions of the NPRM permit licensees to make modifications that do not extend the licensee's current interference contours without Commission approval. See Id. at ¶ 140. The NPRM further states that non-mutually exclusive RCC paging applications for which the "cut-off" date had passed by February 8, 1996, non-mutually exclusive applications for the exclusive 929 MHz PCP frequencies filed with the FCC by February 8, 1996, and applications for shared frequencies received by PCIA by February 8, 1996, will be processed in accordance with existing procedures. Id. at ¶¶ 145-147.

In imposing its freeze, the Commission requested comments, on an expedited basis, on whether during the pendency of this proceeding, incumbents should be permitted to file modifications that would extend their service areas beyond current interference contours, with such modified authorizations being issued on a secondary basis. Id. at ¶ 143.

III. The Freeze will Irreparably Harm Paging Licensees, and Disserve the Public Interest.

Paging is a mature, highly competitive industry, and the FCC has so found. See, e.g., NPRM at ¶¶ 6-7. On average, there are five competing paging companies in each market, and in some markets as many as nineteen. See Second Report and Order in GN Docket No. 93-252, FCC 94-31 at ¶ 140 (released March 7, 1994) ("Second CMRS Order"). This industry serves over 27 million customers nationwide, with increasingly high technical quality and at affordable rates. See NPRM at ¶ 7.

In this competitive industry, expansion plans simply cannot be put on hold for months at a time. Pager One competes in many markets with companies far larger and with far greater resources than itself; it must expand and modify its system, both for technical reasons and in response to market demands, in order to remain competitive.

The harm that the freeze will cause if allowed to continue cannot be overstated; and, its adverse effects will be felt well beyond the companies that hold paging licenses. Paging companies currently employ tens of thousands of people nationwide, and contract for the services of thousands of technicians, salespeople and other persons in support functions. Pager One currently employs 24 people, and had planned to employ up to 82 employees by the end of 1996. Pager One had also planned to invest hundreds of thousands of dollars in equipment and other infrastructure costs; due to the freeze, it has had to cancel equipment orders, and cannot now provide any of its suppliers with projected orders for 1996.

Pager One's subscribers, and those of other paging companies nationwide, will also be harmed. The paging industry has become such a "success story" due in large part to paging operators' responsiveness to subscriber demands, assisted by a regulatory regime that did not unreasonably impede operators' ability to expand their systems in the directions dictated by the market. Customers nationwide have come to rely on the prompt responsiveness of paging licensees; the paging industry provides vital communications services for many of the nation's businesses. The freeze thus impacts not only the paging industry, but also the businesses that rely on paging services; the inability of paging companies to expand to meet their customers' changing needs will negatively affect those customers' abilities to efficiently conduct their own businesses.

In short, the freeze, if allowed to continue, will cause devastating harm to the paging industry, which will have a "ripple effect" extending to subscribers, equipment suppliers, technical support personnel, and many others who conduct business with this industry.

IV. The Interim Licensing Proposal does not Adequately Address the Needs of Paging Licensees and their Subscribers.

The Interim Licensing Proposal, under which incumbent paging operators could make modifications that expand their current interference contours, but only on a secondary basis, partially allays only some of the harm the freeze is causing to paging companies and their customers. However, that proposal falls far short of providing paging companies with a realistic means of carrying out their business plans and meeting customer demand during the pendency of this proceeding.

The costs of adding new transmitters, from preparation of the application through installation, are approximately $20,000.00 per site. See, e.g., PCP Exclusivity Report and Order, FCC 93-479, at ¶ 23, n. 44 (released November 17, 1993); recon. granted in part, Memorandum Opinion and Order, FCC 96-53 (released February 13, 1996). For companies such as Pager

One, realistic expansion plans require a considerable investment. If a subsequent user becomes licensed on a primary basis on the same frequency in or around the same areas at which Pager One has constructed under the Interim Licensing Proposal, Pager One will lose its investment of those funds, as well as its payments under site leases, and may be forced to lay off employees hired in Pager One's "secondary" service areas. It will also lose revenues from subscribers within those transmitters' service areas.

The uncertainty the Interim Licensing Proposal will cause as to whether licensees will be able to carry out their expansion plans for the long term is likely to chill investment in the paging industry. And, the Interim Licensing Proposal will make it more difficult for paging companies to obtain loans and credit: a commercial lender is unlikely to advance funds to construct a system which may well be required to cease operations within a year or two. These loans are invariably secured with the transmitter equipment and FCC license rights of the borrower; no lender will accept "secondary" security for the type of money necessary to build out a paging network. Under the FCC's freeze and Interim Licensing Proposal, debt and equity investment in small paging companies will probably disappear.

Moreover, if a subsequent, "primary" licensee's transmitter does not serve all of the area previously served by the incumbent's "secondary" transmitter, the subscribers served by the incumbent will suffer from a degradation, if not complete loss, of service. Many paging subscribers are members of the medical and law enforcement communities. Those subscribers, and the members of the public whose health and safety depends on them, cannot risk such disruptions in service. The Interim Licensing Proposal places paging subscribers in an untenable position: they can either forego needed paging services, or they can obtain those services now but lose them in the future.

Although Pager One appreciates the Commission's desire to provide paging licensees with flexibility to modify their systems during the pendency of this proceeding, Pager One respectfully submits that the Interim Licensing Proposal does not adequately meet that goal. Since there is so little "white area" left on the frequencies allocated to paging services, neither a "hard freeze" nor the Interim Licensing Proposal will provide sufficient public benefit to outweigh the harm that they will cause to the paging industry.

V. There is a Less Drastic Alternative to the Freeze and the Interim Licensing Proposal.

As detailed in the preceding sections, the freeze is having, and will continue to have, a devastating impact on paging companies and their subscribers, particularly smaller paging companies such as Pager One. The Interim Licensing Proposal, while less harmful than a "hard freeze," will still create uncertainties that will increase costs on licensees and chill investment in the paging industry. In the mature and highly competitive paging industry, neither of these procedures will serve the Commission's intended purpose of preserving spectrum for wide-area licensing and competitive bidding. If the Commission truly wishes to recapture the value of the little remaining paging spectrum for the public, without crippling the growth, flexibility and responsiveness to public demand that have characterized the paging industry, there is a far less drastic means by which to accomplish those laudable ends.

As the Commission itself has noted, there is very little "white area" left on the frequencies allocated to paging services. See NPRM at ¶ 65. Moreover, for the "white area" that remains, there are few places that any party other than the incumbent paging operator on a particular frequency, could locate a transmitter on that frequency consistent with the

Commission's interference standards. See NPRM at ¶ 66. Consequently, the freeze and the Interim Licensing Proposal will not "preserve" much, if any, spectrum that could be used by new entrants into the paging industry; in most parts of the country, there simply isn't vacant spectrum to preserve.

Since any MTA (or other wide-area) licenses that the Commission chooses to allocate are likely to be of value only to incumbents seeking to solidify their position in a particular geographic area, there is nothing to be gained by prohibiting incumbent licensees from filing for necessary modifications now. The freeze and Interim Licensing Proposal are merely preventing paging operators from building out their systems, responding to new and changing customer demands, and maintaining a high quality of service, without any countervailing public interest benefits. That situation could be remedied quite simply, by continuing to accept paging applications under existing procedures, slightly modified, and conducting auctions in those situations where genuine mutually exclusive applications are filed.

Under this approach, "new" or "initial"[2] Part 22 paging applications would continue to be reviewed by the staff and then placed on Public Notice as accepted for filing, triggering the thirty-day period within which interested parties may file petitions to deny and competing applications. If no timely-filed protests or mutually exclusive applications are filed, the application would be granted. Mutually exclusive applications would be subject to competitive bidding.

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[2] Because the definition of an "initial" application is so broad, both under Part 22 and under the general CMRS rules in Part 20, most paging modification applications fall within that definition, and would thus be subject to competitive bidding in the event of mutual exclusivity. Thus, under the current rules, there would conceivably be more geographic area available for auctions than under the NPRM's proposal.

For exclusive 929 MHz PCP applications, a similar process could be instituted.[3] Upon receipt of coordinated "new" or "initial" applications for exclusive PCP facilities, the Commission's staff could place those applications on a weekly Public Notice. Mutually exclusive applications would be required to be filed within 30 days of Public Notice; any mutually exclusive situations would be resolved by periodic auctions. Although this approach would involve modifying the current one-day cut-off for 929 MHz exclusivity requests, there would be no impediment to doing so. It is well-settled that "cut-off" rules are procedural in nature, and may be adopted or modified without regard to the notice and comment provisions of the APA. See Ranger v. FCC, 294 F.2d 240, 244 (D.C.Cir. 1961).[4]

If the Commission is concerned about speculative filings during this interim period, Pager One respectfully submits that there are sufficient mechanisms under the FCC's existing Rules to deter speculators. Part 22 paging applications are subject to petitions to deny under Section 309 of the Act. See 47 U.S.C. § 309(d). Although it is questionable whether petitions to deny would lie against PCP applications before the Budget Act's statutory transition period ends

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[3] For the shared 929 MHz channels, as well as the shared VHF and UHF paging frequencies under Part 90, no mutual exclusivity can occur; i.e., the grant of one application cannot, under the Rules, preclude the grant of another. Applications for the shared channels should continue to be accepted and processed under existing procedures during the course of this proceeding; if the Commission determines to grant some form of exclusivity for those channels in the course of this proceeding, it can do so without freezing the shared channels now. For example, the right to exclusivity within the licensing area at issue could constitute the "authorization" to be auctioned. The shared PCP channels, particularly in the lower bands, are already heavily congested. Any "exclusive" licensee on those channels will need to grapple with the need to protect multiple incumbents in most areas; freezing those channels during the pendency of this proceeding is not likely to materially ease that burden.

[4] Moreover, the industry has certainly received notice that the Commission would be considering adopting consistent licensing rules for Part 22 and Part 90 paging services, including auction rules, for some time now. See, e.g., Third CMRS Order at ¶¶ 346-347.

on August 10, 1996, the Commission has ample authority to treat any protests filed against PCP applicants prior to that date as "informal objections." See 47 C.F.R. § 1.41. Legitimate paging operators such as Pager One will gladly assist the Commission as "private attorneys general" when speculative applications threaten to interfere with their provision of service to their subscribers.

Under this proposal, the Commission could hold auctions to resolve mutually exclusive situations in much the same manner as it periodically held lotteries. Since applications are currently filed for a single transmitter, the contours of which cover a limited geographic area, the number of mutually exclusive applications is likely to be small. The auction procedures applied to these "interim applications" could therefore be kept simple; for example, oral outcry auctions could be held, perhaps telephonically. For situations where a large number of competing applications are filed, sealed bidding might be used. Rather than taking weeks - or months - as simultaneous multiple round auctions have, these auctions, each to resolve a single mutually exclusive situation, would be unlikely to last more than a few hours.

The Commission has authority to adopt specific competitive bidding procedures for various services. See 47 U.S.C. § 309(j)(3). Pager One urges the Commission to adopt, in this Interim Comment Period, simple auction rules to govern cases of mutual exclusivity among the applications now pending, and all paging applications filed prior to the release of a Report and Order in the main rule making proceeding.

Nothing in the Budget Act amendments to the Communications Act compels the Commission to use competitive bidding for only Commission designed service areas. See 47 U.S.C. § 309(j). To the contrary, the Commission has previously stated its approval of the general use of public notices and cut-offs, with auctions to resolve mutual exclusivity as it occurs, for CMRS services. See Third CMRS Report and Order at ¶ 328. Pager One respectfully submits that, regardless of whether the Commission eventually adopts wide-area licensing for paging services, this approach during the pendency of the rule making process would further the Congressional objectives embodied in the Budget Act, and would serve the public interest.

VI. The Freeze may be Unlawful.

Freezing paging applications for the sake of instituting wide-area auctions contravenes the letter and the spirit of the Budget Act amendments to the Communications Act. It is instructive to review the statutory objectives that Congress instructed the Commission to consider in determining whether to award licenses by competitive bidding:

a) "[D]evelopment and rapid deployment of new technologies, products and services ... without administrative or judicial delays..." See 47 U.S.C. § 309(j)(3)(A). Paging is not a new service, but a mature industry. Freezing paging applications to preserve white space for auction will not bring anything "new" to the public, and will cause delays and degradation to the services the public is already receiving. A paging freeze is simply an "administrative ...delay" in licensing, which the Budget Act specifically instructs the FCC to avoid.

b) "[P]romoting economic opportunity and competition... avoiding excessive concentration of licenses and ... disseminating licenses among a wide variety of applicants" - including "Designated Entities." See 47 U.S.C. § 309(j)(3)(B). Paging is already a highly competitive industry, and the FCC itself has so noted. Licenses are already "disseminated ... among a wide variety of applicants;" there are numerous competing paging operators in nearly all markets, and those operators range from large publicly traded corporations to small entrepreneurs.

It is difficult to see how freezing paging applications will improve competition in the paging industry; to the contrary, the freeze has arbitrarily erected entry barriers to new entrants in the paging market, contrary to the Budget Act's statutory intent. Moreover, the freeze is inhibiting incumbent licensees' abilities to compete in the market, which may in turn inhibit their ability to compete in the upcoming auctions. Paging licensees are being harmed by the FCC's freeze, and small businesses, like Pager One, are suffering the most by the inability to build out our systems and respond to increased or changed customer demands for coverage. The longer the freeze continues, the more it threatens the viability of many paging companies, while blocking the entry of new, competitive service offerings in the paging market.

If the freeze continues, it is inevitable that in the region where Pager One provides service, only the largest providers will be left. By constraining small carriers' ability to grow, the freeze is constraining their ability to compete with large, nationwide providers. Unless small carriers like Pager One are able to expand their systems, customers will go to the largest carrier in the market, which already serves the areas the customer wants. The current low prices for paging services are indicative of a highly competitve marketplace; once the smaller carriers are driven out of business, prices will rise, to the detriment of consumers. In many markets where Pager One does business, only one carrier is likely to survive an extended freeze; without competition from companies like Pager One, there will be nothing to stop that carrier from charging monopoly prices. In short, the freeze will have the presumably unintended result of decreasing competition in the paging industry.

c) Recovering a portion of the value of the spectrum for the public. See 47 U.S.C. § 309(j)(3)(C). In opposing this freeze, Pager One is not seeking "free" spectrum from the FCC. Pager One is certainly willing to compete for the authorizations it needs at auction, if its applications are mutually exclusive with others. Recapturing the value of the paging spectrum will not be impeded by the Commission's continued acceptance of paging applications during this proceeding; mutually exclusive applications filed during this proceeding can be subject to competitive bidding regardless of the Commission's final determination of the other issues raised in the NPRM.

d) "[E]fficient and extensive use of the electromagnetic spectrum." See 47 U.S.C. § 309(j)(3)(D). The existing paging industry is unquestionably a model industry under this criterion. Paging licensees utilize very little spectrum, compared to virtually all other services, and they have traditionally expanded to new areas or requested new frequencies only when there was some legitimate business reason to do so. Rather than requesting the assignment of additional spectrum, paging carriers, on their own initiative and at their own cost, have implemented increasingly advanced, spectrally-efficient technologies. Paging companies have aggressively deployed technological advances to increase baud rates, and consequently, spectral efficiency. The freeze effectively halts paging carriers' efforts to upgrade their systems to newer, even more spectrally efficient technologies, by preventing any modifications that would extend a licensee's authorized theoretical interference contours.

It is thus hardly "efficient," or fair, to now prevent paging licensees from continuing to expand and improve their services in response to consumer demand. Simply put, the policy goals embodied in Section 309(j) of the Act can be better achieved by continuing to accept and process paging applications during the pendency of this rule making proceeding.

CONCLUSION

For the foregoing reasons, Pager One respectfully requests that the Commission lift its freeze on paging applications, and resume the accecptance and processing of all paging applications under the alternate proposal detailed herein.

Respectfully submitted,

PAGER ONE

By: ______________________

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March 1, 1996

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CERTIFICATE OF SERVICE

I, Regina Wingfield, a legal secretary in the law firm of Joyce & Jacobs, Attys. at Law, LLP, do hereby certify that on this 1st day of March, 1996, copies of the foregoing Comments of Pager One were mailed, postage prepaid, to the following:

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